STATE OF MICHIGAN

COURT OF APPEALS

JAMES P. THOMAS, JR. d/b/a BIGFOOT TOWING, Plaintiff-Appellee, v CITY OF FLINT, Defendant-Appellant.	UNPUBLISHED April 22, 2014 No. 314212 Genesee Circuit Court LC No. 12-099337-CZ

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion to disqualify the neutral arbitrator, Susan Philpott-Preketes, in this arbitration proceeding regarding a contract dispute. We reverse and remand for proceedings consistent with this opinion.

While this arbitration proceeding was pending, the neutral arbitrator inadvertently sent an email to plaintiff's counsel that was intended for one of her own clients. Plaintiff's counsel then requested the neutral arbitrator to recuse herself and she declined. Because defendant did not agree that the neutral arbitrator was disqualified as a consequence of the inadvertent email, the parties filed a joint complaint for declaratory relief. Shortly thereafter, defendant filed a motion under MCR 2.116(C)(8) and (C)(10) seeking a declaration that the neutral arbitrator was not disqualified. Plaintiff responded to defendant's motion, arguing that the neutral arbitrator demonstrated actual bias against plaintiff or its counsel by refusing to decide a question of law on an estoppel issue raised in the arbitration proceeding. Further, plaintiff argued, because plaintiff's counsel may be a potential witness in any legal malpractice case or request for investigation brought against the neutral arbitrator by her client, an appearance of impropriety existed that must be cured by her disqualification. Defendant replied that the three-member arbitration panel's decision on the estoppel issue was unanimous and the inadvertent email did not give rise to any ethics or malpractice violations; thus, any appearance of impropriety was speculative at best.

During oral arguments on the motion, the trial court stated: "The record should be clear that the inadvertent email has nothing to do with this case. It doesn't talk about this case. It deals with a different subject." However, the court noted, the email did contain sensitive information regarding another case. Thus, although speculative, the neutral arbitrator's client

could bring a grievance or malpractice claim against her related to the inadvertent disclosure. The court cautioned that it was not suggesting that the neutral arbitrator did anything unethical or inappropriate with regard to this arbitration proceeding or that client's case, but concluded that a different neutral arbitrator should be appointed because "it's just easier to get a different arbitrator." Thus, the trial court entered an order granting plaintiff's motion to disqualify the neutral arbitrator and ordering that a replacement be selected. Defendant filed a motion for reconsideration, arguing that there were no grounds to disqualify the neutral arbitrator and, thus, the court should reverse its ruling. The court denied the motion for reconsideration and, after the parties could not agree on a neutral arbitrator, the court entered an order appointing a replacement neutral arbitrator. This appeal followed.

Defendant argues that the neutral arbitrator should not have been disqualified because no evidence of actual bias existed, no ethics violation occurred, and there was no violation of the appearance of impropriety standard. We agree.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). With regard to a motion for disqualification, we review the trial court's factual findings for an abuse of discretion, but the application of the facts to the law is reviewed de novo. *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003).

The arbitration contract between plaintiff and defendant did not address the grounds for disqualification of an arbitrator; consequently, the parties have relied on the standards applicable to judicial disqualification set forth at MCR 2.003. Although somewhat instructive, we disagree that the standards for judicial disqualification wholly apply to arbitrators. Relevant here, MCR 2.003(C)(1)(b) provides that disqualification of a judge is warranted when "[t]he judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias . . . or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." Canon 2 states: "A judge must avoid all impropriety and appearance of impropriety." While we agree that an arbitrator should be disqualified if, based on objective and reasonable perceptions, the arbitrator has a serious risk of actual bias, we disagree that "the appearance of impropriety standard" is applicable to arbitrators. Arbitrators are not judges and are not subject to the Code of Judicial Conduct. See, *e.g.*, *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145, 150; 89 S Ct 337; 21 L Ed 2d 301 (1968) (White, J., concurring). Our Supreme Court succinctly described a judge's role and importance in our society in the case of *In re Bennett*, 403 Mich 178; 267 NW2d 914 (1978), explaining:

> For generations before and since it has been taught that a judge must possess the confidence of the community; that he must not only be independent and honest, but, equally important, believed by all men to be independent and honest. A cloud of witnesses testify that 'justice must not only be done, it must be seen to be done.' Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy.
>
> The point, then, as also reflected in our judicial canons and opinions dealing with other judicial misconduct cases, is that a judge, whether on or off the bench, is bound to strive toward creating and preserving the image of the justice system as

> an independent, impartial source of reasoned actions and decisions. Achievement of this goal demands that a judge, in a sense, behave as though he is always on the bench. [*Id*. at 198-199 (quotation marks and citation omitted).]

Clearly, arbitrators are not similarly situated to judges; thus, we conclude that "the appearance of impropriety standard" applicable to judges does not apply to arbitrators. In any case, even if it applied, an unintentional email sent to a party's attorney that disclosed irrelevant information, as occurred here, does not constitute a violation of this standard.

Further, the unintentional email did not give rise to an objective and reasonable perception that a serious risk of actual bias existed. See MCR 2.003(C)(1)(b). First, the fact that the inadvertent email was sent was disclosed, and the email did not contain any information about the case pending before the neutral arbitrator. Second, the mere possibility that plaintiff's counsel could be called as a witness in a legal malpractice case or a request for investigation brought against the neutral arbitrator by her client does not give rise to an objective and reasonable perception that a serious risk of actual bias existed. That is, an objective and reasonable person would not entertain a doubt or be left with a reasonable impression of possible bias regarding the ability of the neutral arbitrator to be impartial under these facts. Neither a legal malpractice case nor a request for investigation had been filed against the neutral arbitrator by her client. Moreover, if plaintiff's counsel was required to give any such testimony related to the inadvertent email, he would be required to provide truthful testimony regardless of the decision rendered in the arbitration matter; thus, contrary to plaintiff's apparent claim, the arbitrator had no personal interest in the outcome of the arbitration. Third, a challenge to the arbitration award rendered in this case based only on this unintentional email would not be sufficient under MCR 3.602(J)(2)(b) to establish "evident partiality" by the neutral arbitrator. "[T]he partiality or bias which will overturn an arbitration award must be certain and direct and not remote, uncertain or speculative." *Kauffman v Haas*, 113 Mich App 816, 819; 318 NW2d 572 (1982); see also *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988). And we will not presume, as plaintiff requests, that this arbitrator will abandon her duty to act as a neutral arbitrator in this proceeding because of a desire to punish plaintiff's counsel for raising the issue of the inadvertent email. Accordingly, we reverse the trial court's order granting plaintiff's motion to disqualify the neutral arbitrator premised on these grounds.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh